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No. 1197

In the
Supreme Court of the United States

OCTOBER TERM, 1965.

GAMBLE-SKOGMO, INC., a Delaware corporation,
Petitioner,

vs.

ALBERT W. GASS and GASS & SCHROEDER, INC., an Illinois corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Question Presented	2
Federal Rule Involved	2
Reasons for Granting the Writ	2
The Conflicting Decisions	10
Conclusion	16

TABLE OF CASES CITED.

Anderson v. Yankau, 329 U.S. 482 (1946)	10
Cantwell v. Harding, 249 Ill. 354; 94 N.E. 488 (1911)	10
C. & A. R. R. Co. v. Keegan, 185 Ill. 70; 56 N.E. 1088 (1900)	10
Clegg v. Hardware Mutual Casualty Co., 264 F.2d 152 (5 Cir., 1959)	7, 12
Downie v. Powers, 193 F.2d 760 (10 Cir., 1951)	9, 13
Garland v. Material Service Corporation, 291 F.2d 861 (7 Cir., 1961)	6, 9
Gibson v. Lockheed Aircraft Service, Inc., 350 U.S. 356 (1955)	3
Gwinett v. Albatross S.S. Co., 243 F.2d 8 (2 Cir., 1957), Cert. den. 355 U.S. 828 (1957)	11
Hardigg v. Inglett, 250 F.2d 895 (1957)	11
Harry Alter Company v. Chrysler Corporation, 285 F.2d 903 (7 Cir., 1961)	5, 15
Hickman v. Taylor, 329 U.S. 495 (1947)	8

PAGE

Levin v. Joseph E. Seagram & Sons, 158 F.2d 55 (7 Cir., 1946) Cert. den. 330 U.S. 835 (1947) 6

Ross v. United States, 180 F.2d 160 (6 Cir., 1950), Cert. den. 334 U.S. 832 (1952) 6, 12

Terminal R.R. Ass'n. v. Staengel, 122 F.2d 271 (8 Cir., 1941) Cert. den. 314 U.S. 680 (1941) 7, 8, 12

Tyrill v. Alcoa Steamship Company, 185 F. Supp. 822 (S.D.N.Y. 1960) 11

Wright v. United States, 339 F.2d 578 (9 Cir., 1964) 6, 10, 13

RULES CITED.

28 U.S.C.A., Rule 51, Federal Rules of Civil Procedure 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14

18 U.S.C.A., Rule 30, Federal Rules of Criminal Procedure 3, 7, 9

TEXTBOOKS CITED.

Moore's Federal Practice (2d Ed.) Vol. 5, Sec. 51.05 .. 10

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ALBERT W. GASS and GASS & SCHROEDER, INC., an Illinois corporation,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gamble-Skogmo, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on February 25, 1966.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed as Appendix A hereto.

JURISDICTION.

Judgment of the Court of Appeals (Appendix B) affirming a $100,000 verdict against Petitioner for an al-

leged business fraud, subject to a remittitur of $25,000 ordered by the Court of Appeals, was entered February 25, 1966. On March 3, 1966, respondents filed the remittitur. (Appendix C). Jurisdiction of this Court rests on 28 U.S.C. §1254.

QUESTION PRESENTED.

Whether petitioner was denied a fair jury trial because the District Court disregarded the command of F.R.C.P. 51 that "The court shall inform counsel of its proposed action upon the requests [for instructions] prior to their arguments to the jury," directly refused to rule upon the requests, and at no time advised counsel that it would, as it did, instruct the jury that it could find fraud liability without proof of scienter and could award punitive damages.

FEDERAL RULE INVOLVED.

That portion of Federal Rule of Civil Procedure 51 which follows:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed." (28 U.S.C.A., Rule 51)

REASONS FOR GRANTING THE WRIT.

The Court of Appeals, contrary to other Courts of Appeal, has sanctioned a deliberate departure by the District Court so far from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

The case is worthy of certiorari both by reason of conflicts between circuits and because in and of itself the decision emasculates the relevant provisions of Rule 51 of the Federal Rules of Civil Procedure and, by extention, the identical provisions of Criminal Rule 30. Civil Rule 51 and Criminal Rule 30 are of tremendous importance in all jury trials and protection and construction of them is worthy of this Court's attention.

Rule 51 has never been construed by this Court,[1] nor has this Court construed the counterpart provision in Criminal Rule 30.[2]

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[1] In 1955 this Court granted certiorari in *Gibson* v. *Lockheed Aircraft Service, Inc.*, 350 U.S. 356, to consider a Rule 51 question, but upon plenary consideration, disposed of the case without reaching the question as to the Rule (350 U.S. 356, 1955).

[2] Federal Rule 30 of Criminal Procedure is identical, in relevant respects, to Civil Rule 51. We set forth in its entirety Criminal Rule 30, italicizing language in it which differs from Civil Rule 51, and setting forth in capital type the identical relevant portion with respect to the Court's duty to inform counsel of its ruling upon requests for instructions:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. *At the same time copies of such requests shall be furnished to adverse parties.* THE COURT SHALL INFORM COUNSEL OF ITS PROPOSED ACTION UPON THE REQUESTS PRIOR TO THEIR ARGUMENTS TO THE JURY, but the court shall instruct the jury after the argments are completed. No party may assign as error *any portion of the charge or omission therefrom* unless he objects thereto before the jury retires to consider *its* verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." (18 U.S.C.A., Rule 30)

Although the Rule is in mandatory language placing an affirmative duty on trial judges to inform counsel of its proposed action where written requests for instructions have been submitted, the Courts of Appeal have developed conflicting theories as to how closely it must be followed and as to what will excuse compliance with this duty by trial judges. These escape routes have had an increasingly erosive effect on the Rule culminating in the case at bar in which the District Court, in unabashed defiance of the Rule, *"purposely"* refused to make rulings on tendered instructions. (R. 450)[3] The critical colloquy and ruling is set forth in the margin.[4]

([2] Continued)
As to the purport, effect, and intent of this Rule, the Notes of the Advisory Committee on Criminal Rules state:

> "This rule corresponds to rule 51 of the Federal Rules of Civil Procedure, the second sentence alone being new. It seemed appropriate that on a point such as instruction to juries there should be no difference in procedure between civil and criminal cases." (18 U.S.C.A., p. 605)

[3] References to the Appendix used in the Court of Appeals are shown as "R".

[4] "Mr. Storms: Under Rule 51, third paragraph, as I understand it the counsel are supposed to know before they argue really what the charge is going to be so they can argue it intelligently and not put their foot in their mouth.
"The Court: I purposely don't give you my charge before hand, because I would rather you argue the facts to the jury, instead of the wisdom of my charge.
"Mr. Storms: I understand that.
"The Court: I have therefore followed that procedure in all the cases, and this is my constructure of that ruling, and you may note an objection thereto, that you won't have to argue.
"Mr. Storms: I understand, and I am asking for specific ruling on specific instruction so I can show

The case at bar, alleging a commercial fraud, was complicated by an Amendment of the Complaint after the evidence was closed, changing it from one which had claimed only that Petitioner "knew" certain representations to be false, (R. 3 *et seq.*), to one which sought to found an action on the theory that Petitioner "knew, or *should have known*" that different (some undefined) alleged representations were false. (R. 576 *et seq.*)

At the time of the amendment Petitioner had on file requested instructions based upon the theory of the original complaint that Petitioner "knew" its representations were false (R. 557); Respondents had presented requests for instructions based on the theory that Petitioner "knew or should have known" of the alleged falsity (R. 565), and a suggested instruction on punitive damages (R. 566).

All that counsel knew prior to argument to the jury as to how the District Court would resolve this conflict was the Court's announcement, "I intend, * * * to state the law as annunciated by our 7th Circuit quite recently,[5] and also by the Supreme Court of Illinois applicable to this type of situation". (R. 452) In other words, the District Court merely said it would follow the decisions as it understood them. That much is always presumed and was of no guidance whatsoever to counsel where instructions involving conflicting understandings of the law had

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([4] Continued)

my specific objections to a particular numbered instruction and make a record that way, so I know before hand and can argue accordingly. That is my request, sir.

"The Court: Very well, and the request is denied." (R. 450)

[5] The District Court's reference was to *Harry Alter Company* v. *Chrysler Corporation*, 285 F. 2d 903 (7th Cir., 1961) which clearly held that the law of Illinois requires knowledge of falsity and which did not involve punitive damages.

been submitted. See *Ross* v. *United States,* 180 F.2d 160, 165 (6 Cir., 1950), Cert. den. 334 U.S. 832 (1952); *Wright* v. *United States,* 339 F.2d 578, 579 (9 Cir., 1964), "cryptic remarks" are "inadequate".

The District Court's purposeful disregard of the Rule was glossed over by the Court of Appeals' failure even to mention Rule 51, although it had been vigorously argued, and by the elusive statement that "* * * the parties [were] advised as to the instructions the court would give * * *." (App. 8a) The latter ruling of the Court of Appeals is consistent only with a view that Rule 51 is satisfied if the trial court informs counsel of the general field of law to which its instructions will be addressed. This, contrary to the construction of other circuits, waters the Rule to the vanishing point for it may be assumed that in every case the instructions will be within the field of law involved.

Heretofore, the Court of Appeals for the 7th Circuit has held Rule 51 must be complied with, but has treated a general announcement by the Court that it is going to give most of the tendered instructions in substance except those that are argumentative, which announcement is accepted by counsel and is not followed by a request for a more specific ruling, as not sufficiently prejudicial to warrant reversal. (*Levin* v. *Joseph E. Seagram & Sons,* 158 F.2d 55 [7 Cir., 1946] Cert. den. 330 U.S. 835 [1947]). And in that opinion [p. 58] the Court held that District Courts "should not act arbitrarily when request is made by counsel as to the action of the court on the instructions requested * * *." Fourteen years later, in *Garland* v. *Material Service Corporation,* 291 F.2d 861 (7 Cir., 1961), the Court ruled [p. 863] that "trial judges *should endeavor to substantially comply with Rule 51* because,

under certain circumstances, refusal to do so might well be reversible error." The decision at bar is thus, so far as the 7th Circuit is concerned, at variance with prior 7th Circuit decisions, for the District Judge in the instant case *"purposely"* refused to comply with the Rule and trial counsel in no way acquiesced in this departure but requested specific rulings.[6]

In the 2nd, 6th, 9th and 10th Circuits there have been decisions that verdicts must be set aside for non-compliance with Rule 51 (or the companion provision in Criminal Rule 30) and in the 2nd, 4th, 5th and 8th there have been holdings that the Rule should be obeyed, but that non-compliance will not warrant a new trial absent a showing of prejudice or, alternatively, a showing that counsel sought to reopen the jury arguments after the District Court gave its charge. Thus, there is confusing conflict and uncertainty that can be dissolved only by this Court.

No part of a federal jury trial, civil or criminal, is more important than the charge to the jury. Federal judges are deeply respected by jurors; their charges carry great weight. Therefore, it is of utmost importance that counsels' jury arguments be addressed to the issues posed by the Court's charge. (*Clegg* v. *Hardware Mutual Casualty Co.*, 264 F.2d 152, 157 [5 Cir., 1959]; *Terminal R.R. Ass'n.* v. *Staengel*, 122 F.2d 271, 277 [8 Cir., 1941] Cert. den. 314 U.S. 680 [1941]). An argument not addressed to the charge is ineffective and likely to result in a wrong, or partially wrong, verdict as the Court of Appeals agrees was the case here.

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[6] The District Court's reason for disregarding Rule 51 namely, that he "would rather you argue the facts to the jury, instead of the wisdom of my charge", is utterly invalid. Any lawyer who attempted to argue "the wisdom of [a court's] charge" might quite likely (and properly) suffer summary punishment for contempt.

Counsel for Petitioner in the case at bar erroneously deduced from the District Court's "cryptic" pronouncements that the District Court would not instruct on the "should have known" theory or on punitive damages, and did not argue those topics. The result, with alleged actual damages of about $28,000, was a verdict of $100,000 which the Court of Appeals reduced to $75,000. Had counsel been advised, as required by Rule 51, and argued the topics, who is to say whether there would have been any award at all, much less a punitive one?

This Court, has endeavored to bring about trials that are less a game of "blindman's bluff" (*Hickman* v. *Taylor,* 329 U.S. 495, 501, [1947]). It would scarcely be consistent with the type of practice this Court has been endeavoring to promote were the Court to permit District Judges "purposely" to send advocates before a jury, as here, to engage in a game of "blindman's bluff" as to what rule of law would apply to the facts they were arguing. This Court could scarcely urge better advocacy if it permitted trial judges to blunt or to withhold an important tool of good advocacy.

And it is important that there be uniformity of procedure in this vital area: The practice of having judges serve wherever there may be crowded dockets throughout the country is being utilized increasingly. A judge trained in what appears to be the 8th Circuit's so-called "practical" rule for dealing with non-observance of Rule 51, namely that after hearing an unexpected charge counsel should seek to reopen the arguments to the jury (*Terminal R.R. Ass'n.* v. *Staengel,* 122 F.2d 271, 277 [8 Cir., 1941] Cert. den. 314 U.S. 680 [1941]) is likely to confuse or innocently to mislead members of the Bar and arrive at an improper result when sitting in the 10th Circuit which holds that "failure of the court to observe either the letter or the

spirit of the rule was prejudicial error" (*Downie* v. *Powers,* 193 F.2d 760, 767 [10 Cir., 1951]). And note the overtones of a variation between circuits where a judge from the 9th Circuit functioned in the 7th in *Garland* v. *Material Service Corporation,* 291 F.2d 861, 862 (7 Cir., 1961).

For many years this Court has appointed and worked with advisory committees of lawyers and judges to refine and to protect rules of fair procedure. Members of the Bar can scarcely be expected to cooperate in such salutary activities if District Judges are not informed by this Court that they, as well as lawyers, must abide by rules of procedure established by this Court even though a particular rule may cast a duty of advance precision on them.

The fact that the Court of Appeals opinion of which review is sought disguises, rather than reveals, the fact that it is actually scuttling Rule 51, is an additional reason for granting, rather than withholding, certiorari. There is a duty on Courts of Appeal to face and decide issues not captiously presented.

It is difficult to see how the 7th Circuit will reform if certiorari were denied. The District Judge, for reasons which are impermissible under Rule 51, flatly refused to obey the Rule and says he has "followed that procedure [of disobedience] in all the cases." (See Note 4 above.) Since many questions of practice, policy and procedure in a large Circuit pass from District Judge to District Judge through mutual exchanges of experience, it is not necessary that a Court of Appeals write an opinion directly saying, as it would not dare say, that it will overlook violations of Rule 51, in order that general knowledge of such effective annulment, *sub silentio,* of Rule 51 (and presumably companion Criminal Rule 30) be disseminated throughout the Circuit.

THE CONFLICTING DECISIONS

The language of Rule 51 is mandatory,[7] its purpose is clear. Moore's Federal Practice (2nd Ed.) Vol. 5, Sec. 51.05 states:

> "The Rule contemplates that counsel shall be informed before the argument as to whether requested instructions will be given so that the arguments may be patterned to fit the charge."

The question of correctness of the tendered instructions is irrelevant to the purpose sought by the portion of the rule under consideration. (*Wright* v. *United States,* 339 F.2d 578, 580 [9 Cir., 1964]). What is sought by the rule is that counsel be informed, before arguing, what the charge, right or wrong, will be so that they may adjust their arguments accordingly.

Here the District Court deliberately withheld the required information. Even if, (which we dispute), the charge was correct,[8] nevertheless Petitioner was deprived of the right to have its counsel make an argument directed to that charge. It follows that one of the reasons

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[7] In construing the rules this Court has recognized that "shall" as opposed to "may" is a word of command. (*Anderson* v. *Yankau,* 329 U.S. 482, [1946])

[8] The law of Illinois requires *scienter* before there can be an action for fraud and deceit. (*Cantwell* v. *Harding,* 249 Ill. 354; 94 N.E. 488 [1911]). The charge also (R. 453 *et seq.*) was conflicting. At places it adopted the "knew or should have known" theory, at others it seemed to require actual knowledge of the alleged falsity. Conflicting instructions always have been reversibly erroneous under the law of Illinois. (*C. & A. R.R. Co.* v. *Keegan,* 185 Ill. 70, 79; 56 N.E. 1088, 1091 [1900]).

given by the Court of Appeals' opinion excusing violation of the Rule, namely that "the jury was properly instructed * * *" is irrelevant. (We have earlier shown that the Court's second reason, namely "* * * the parties [were] advised as to the instructions the court would give" is consistent only with the view by the Court of Appeals for the 7th Circuit that all that is required of the Trial Judge is that he tell the general topics which his charge will embrace.)

Several of the Courts of Appeal have promulgated various doctrines relaxing the unqualified mandate of Rule 51; none go so far as the decision at bar; several are flatly contrary to it:

The 2nd Circuit holds that the Rule must be followed, but that mere failure of the record to show affirmatively that the trial court did inform counsel of its proposed action upon the requests is not deemed sufficient to raise the question. Inferentially the 2nd Circuit holds there must be some showing of prejudice resulting from failure of compliance. (*Gwinett* v. *Albatross S.S. Co.*, 243 F.2d 8, 9, [2 Cir., 1957] Cert. den. 355 U.S. 828, [1957]). At least one District Court in the 2nd Circuit set a verdict aside where failure of counsel to press for a specific ruling on the proposed instructions was explainable and where noncompliance had created prejudice. (*Tyrill* v. *Alcoa Steamship Company*, 185 F. Supp. 822 [S.D. N.Y. 1960]).

In the 4th Circuit, *Hardigg* v. *Inglett*, 250 F.2d 895, (1957) stands for the proposition that noncompliance does not warrant a new trial unless material prejudice is shown. Such is held not to exist if counsel argued all of the propositions that actually were at issue under the charge as given, and failed to except to the Court's refusal to give a portion of one of its tendered instructions.

In the 5th Circuit it is held that "in addition to the explicit requirements of Rule 51" as to tendered instructions, counsel are entitled to know in advance whether the Court proposes to use a general verdict or a special issue verdict but that under the circumstances of a particular case this extension of the rule had not been violated to anyone's prejudice. The 5th Circuit thus held not merely for a literal application of the Rule with respect to instructions but an extension of its principle to other features of a trial. (*Clegg* v. *Hardware Mutual Casualty Co.*, 264 F.2d 152, 159 [5 Cir., 1959]).

The 6th Circuit, in a criminal case, *Ross* v. *United States*, 180 F. 2d 160, 166 (6 Cir., 1950); Cert. den. 334 U.S. 832 [1952], set aside a verdict where the District Court, as here, gave an inconclusive announcement as to how he would rule upon tendered instructions and said, much like the trial judge here, that his charge would "cover the correct law governing the case."

The 8th Circuit presents a variation of excuses for non-enforcement of the Rule in *Terminal R.R. Ass'n. of St. Louis* v. *Staengel*, 122 F.2d 271 (8 Cir., 1941) Cert. den. 314 U.S. 680 (1941). There the trial court after announcing that a certain instruction would not be given changed its mind during the jury argument and included part of the instruction in its charge. The Court of Appeals, by a divided opinion, said "this troublesome situation" must be handled in a "practical way" and promulgated the dubious doctrine that it became the duty of counsel to salvage the court by requesting that further argument to the jury be permitted in the light of the unexpected charge; that failure to make such a request precluded a new trial.

The 9th Circuit presents a case which, in relevant part, is remarkably close to, and directly in conflict with the case at bar: *Wright* v. *United States,* 339 F.2d 578 (9 Cir., 1964). There counsel submitted written requests for instructions. Upon request for a ruling, the trial court responded [p. 579]:

> "I am going to give the general instructions. And you go ahead and argue the case any way you want to argue it. And I will instruct the jury as to the law involved in this case."

The tenor of the forgoing statement by the trial judge in *Wright* is precisely that of the statement of the trial judge here (See Note 4, *supra*). The Court of Appeals pointed out that the foregoing "cryptic" utterance was "inadequate"; that because the trial court had failed to inform counsel of his rulings, counsel had based his argument upon a theory which the court rejected, or at least ignored, in its instructions. The Government contended that the instructions which defense counsel had tendered were faulty. The Court of Appeals for the 9th Circuit rejected that argument as irrelevant and held that because of the court's failure to advise counsel of his ruling prior to the closing argument the case must be reversed.

The 10th Circuit recognized the 8th Circuit's suggestion for reopening of the argument in *Downie* v. *Powers,* 193 F.2d 760, 766 (10 Cir., 1951), but refused to apply it and upheld the Rule saying,

> "Counsel did not know what those instructions would be until after his argument, and we think in these circumstances, the failure of the Court to observe either the letter or the spirit of the Rule was prejudicial error."

Plainly, under the 10th Circuit's doctrine petitioner would be entitled to a new trial here.

In sum: The 7th Circuit has abandoned its early doctrine that if the party is prejudiced in its arguments to the jury by non-compliance with the Rule, he may have a new trial and instead, without even referring to the language of the Rule, now holds that if the charge is substantively correct and if the Trial Court indicated he would charge on the field of law involved, its non-compliance with the Rule may be excused even though the resulting verdict is so erroneous that it must be reduced by 25%. In such a holding the 7th Circuit is contrary to the 2nd, 4th, 5th, 6th, 8th, 9th and 10th Circuits.

The 8th and 10th Circuits seem to be in conflict as to whether or not counsel must request a reopened jury argument where there has been a surprise in the instructions after they are given.

It is respectfully suggested that this Court should take this case and announce whether under any circumstances, a District Judge may deliberately and "purposely" refuse to obey an important mandatory rule of trial practice promulgated by this Court.

If this Court should hold that actual prejudice to the litigant must be shown, then the Court will have to consider that this record indubitably shows that the original complaint charged only that defendant "knew" that the man intended as an operator of a business for a proposed new franchise holder did not then have a certain sum of money, and therefore it knowingly made false representations as to his ability to invest. However, the District Court permitted an amendment changing the complaint to one alleging that petitioner knew or *"should have known"* that

other, different, and some unspecified representations were false. In his charge the Court summarized the issues of the *amended* complaint and told the jury that the plaintiff alleged "in his complaint"[9] that such representations * * * were made * * * when the defendant knew or *should have known* that such representations were false * * * " (R. 455); told the jury "you will first determine whether or not the defendant is guilty as *charged in the plaintiff's complaint*" (R. 460); and submitted verdict forms under which the jury was to "find the issues on the complaint herein" in favor of one party or the other (R. 468-469). Additionally, the Court told the jury it could bring in a verdict for punitive damages. (R. 466-467)

The District Court had announced before argument, "I shall rely on entirely and enunciate the law to be as it was recently found by the 7th Circuit in the case of 285 F.2d" (R. 446) and "I intend * * * to state the law as annunciated by our 7th Circuit quite recently, and also by the Supreme Court of Illinois applicable to this type of situation" (R. 452). The District Court's reference was to *Harry Alter Company* v. *Chrysler Corporation,* 285 F.2d 903, 905 (7 Cir., 1961) where it was held "incumbent upon plaintiff" in an action of fraud and deceit to prove that the defendant *knew* of the falsity; the case did not involve punitive damages.

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[9] In the charge the District Court referred to "complaint" when in fact, the context shows he meant "amended complaint".

Relying upon what he thought the "cryptic" comments meant, Petitioner's counsel argued[10] that the Court *would* instruct that there had to be actual knowledge of the falsity before there was a cause of action, and moreover, did not argue punitive damages. The Court of Appeals agrees that the verdict was at least partially, we say entirely, wrong. Petitioner was prejudiced.

CONCLUSION

We respectfully pray that the writ of certiorari issue.

Respectfully submitted,

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[10] Arguments of counsel are not contained in the printed appendix filed with this petition. They are contained in the typewritten record in the Court of Appeals. We assume opposing counsel will not dispute our assertion, but if necessary we shall request that portion of the typewritten record containing the arguments of counsel be certified.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965—JANUARY SESSION, 1966

Nos. 15283-84

ALBERT W. GASS and
GASS & SCHROEDER, INC.,
an Illinois corporation,
Plaintiffs-Appellees
Counterdefendants-Appellants.

v.

GAMBLE-SKOGMO, INC.,
a Delaware Corporation,
Defendant-Appellant
Counterclaimant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

February 25, 1966

Before SCHNACKENBERG, CASTLE *and* KILEY, *Circuit Judges*

CASTLE, *Circuit Judge.* Plaintiffs Albert W. Gass and Gass & Schroeder, Inc., a corporation owned by Gass, brought this diversity action against Gamble-Skogmo, Inc. (hereinafter referred to as Gamble) to recover compensatory and punitive damages for fraud and deceit. Gamble counterclaimed for goods sold. Plaintiffs defended the counterclaim on the ground that the orders for the goods were obtained by the fraud declared upon in their complaint.

The cause was tried to a jury which returned a verdict for plaintiffs in the sum of $100,000, approximately $72,000 of which represents punitive damages and the balance the claimed actual damages. The jury also returned a verdict in favor of Gamble in the sum of $10,241.66 on its counterclaim. Judgments were entered on the verdicts.

Gamble in its appeal (No. 15283) contends that there is no evidence to establish fraud or deceit upon its part and therefore the District Court erred in failing to grant its motion for judgment notwithstanding the verdict. Gamble additionally contends the court erred in the procedure followed with respect to instructions, erred in giving certain instructions, and asserts that inconsistency in the verdicts requires that they be set aside. Although plaintiffs prosecuted an appeal (No. 15284) from the judgment entered on the counterclaim they do not urge it is erroneous insofar as it serves only as a set-off against the judgment awarded plaintiffs.

The District Court properly denied Gamble's motion for judgment n.o.v. if the record discloses evidence which justified the submission of the case to the jury. *Gunning* v. *Cooley,* 281 U.S. 90; *Lambie* v. *Tibbits,* 7 Cir., 267 F. 2d 902. In determining that question we must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the plaintiffs. *Woods* v. *Geifman Food Stores, Inc.,* 7 Cir., 311 F. 2d 711, 713; *Pinkowski* v. *Sherman Hotel,* 7 Cir., 313 F. 2d 190, 192.

Our examination of the record in the light of the governing principle above set forth convinces us that it contains evidence which warrants a jury finding of the presence of those elements requisite to establish liability in Gamble for fraud and deception wantonly and designedly perpetrated by Gamble upon plaintiff Gass and his corporation.

We will not extend this opinion to accommodate a detailed recital of the evidence but will briefly relate the factual background which formed the setting in which the pertinent events occurred and point to some of the conduct on the part of Gamble's representatives, with respect to which there is support in the record, and which serves to sustain the verdict.

During the period here pertinent Gamble was engaged in the wholesale distribution and retail sale of hardware, appliances, and miscellaneous merchandise. It owned 500 stores in its own account. It franchised over 2000 retail stores in the United States and Canada to operate under its name as a part of the Gamble "chain". These franchised dealers are private, investors-owners, who purchase

their products for resale from Gamble, and receive general business assistance from Gamble in the operation of their respective stores. Such assistance includes a bookkeeping-accounting service in connection with which the franchised dealer or store operator submits a weekly report of the store's receipts and expenditures to Gamble on a form furnished by it and receives a monthly report or statement from Gamble.

Gass is a semi-retired former retail grocery chain and advertising agency executive. He was interested in investing in a business but not in becoming the operating owner. In October, 1961, Gass responded to a Gamble advertisement for franchise-store dealers. Gamble sent him its brochure entitled "Planned Success" containing representations concerning Gamble's relationship with its franchise dealers, describing the accounting and business services furnished, and setting forth representative sales and profit figures of Gamble store operators. This was followed by a visit from Ora McCarger, Gamble's development representative for a six-state area, including Illinois. McCarger's duty was to develop new stores.

Gass explained to McCarger his requirements for investing in the operation of a Gamble franchise store. These criteria, which were later repeated in correspondence and subsequent oral discussions, and remained constant during the period which ensued, involved the factors that Gass desired as a co-owner, who would operate the store, an individual who was a successful person capable of assuming control of the enterprise, and who had $15,000 to invest in the venture. Gass was prepared to invest the balance of the funds required. The co-owner would receive a salary and in addition a share of the net profits, which he could use to buy out Gass' interest.

After a proposal to open a store near Rockford, Illinois, on the basis outlined failed to materialize, McCarger, in July, 1962, advised Gass that he might have a new prospect at a new location. In October, McCarger disclosed the location to be Hoopeston, Illinois, and the prospective co-owner to be Harold Schroeder, the operator of a Gamble franchise store at Tuscola, Illinois, since 1959, who, it was stated, was looking for a larger operation. Schroeder was a high school graduate. He had no training in accounting and the Tuscola store was his first business venture. He had formerly worked as a truck driver and a salesman.

Hoopeston was a potentially desirable market estimated as capable of producing a sales volume in excess of $200,000 per year. McCarger represented Schroeder as being the operator of a "very successful" Gamble store at Tuscola; a good salesman who had done a "terrific job"; and who had bought the Tuscola store "on a shoestring" and had developed the business to the point where he had a sizeable investment and the necessary funds to make the $15,000 investment Gass required. Following McCarger's October visit Gass wrote him on November 3, 1962, requesting that he be furnished "a picture of the store operations at Tuscola" and an estimate of Schroeder made by his supervisor. The letter went unanswered but shortly thereafter McCarger and Bernard C. Heile, Gamble's zone superintendent for 18 Illinois stores, including Schroeder's operation at Tuscola, met with Gass. When Gass inquired as to when he would receive the store operating statements requested he was informed by Heile that they were regarded as confidential and couldn't be shown to him. Gass stated he wanted to see them for the purpose of determining how successful a store manager Schroeder was, how the store was running, and if Schroeder had the $15,000 to invest. Heile assured Gass that Schroeder had the $15,000 and was a successful store manager. He promised to furnish Gass with written information on Schroeder's financial ability.

Gass, Heile, and McCarger met with Schroeder, the proposal was outlined, and the group went to Hoopeston to examine the location. On November 27, 1962, the group met again at Hoopeston where the terms of a lease for the building to be occupied by the proposed store were negotiated with the owner of the property. Gass asked Heile for the promised financial statement on Schroeder. Heile replied that he hadn't gotten it because a physical inventory would have to be taken of the Tuscola store in order to prepare such a statement, but he would see to it that such an inventory was taken the next weekend. McCarger assured Gass that he had a buyer for the Tuscola store and that it would sell for $15,000 or more. On December 20, 1962, the application Schroeder had made to Gamble in connection with the proposed Hoopeston store was shown to Gass by McCarger. It indicated Schroeder's net worth at $11,000. The Tuscola store inventory was listed at $12,000 and Schroeder's annual salary was shown at $3900. McCarger advised Gass that Schroeder's sales were

$65,000 per year. McCarger stated that the $12,000 figure was the result of an understatement of the inventory.

On December 27, 1962, Gass was advised by McCarger that the Tuscola store had been sold, that Schroeder's $15,000 was forthcoming, and "everything is fine". On the next day Gass entered into an agreement with Schroeder under the provisions of which $80,000 would be invested in a new corporation to operate the Hoopeston store. The agreement provided that Schroeder was to supply $16,000 and Gass the balance. Gass then proceeded to organize such a corporation, deposited $36,500 to its account, and executed and delivered the lease for the store building for a five year period at a rental of $3600 per year. Gass purchased and paid for merchandise and services for the opening of the Hoopeston store in the sum of $19,569.50, and ordered and incurred a liability for an additional $10,241.66 of merchandise from Gamble, and prepared to open the store.

When, on January 24, 1963, the sale of the Tuscola store was closed and completed, Schroeder after applying the proceeds to the payment of the obligations of the business, including $3600 to Gamble, had but $277.60 and still owed $1500 in connection with the original purchase of the Tuscola store from John Rothgeb in 1959. The inventory of the Tuscola store proved to be but $6,374.39. Gass, upon learning that Schroeder did not have the $15,000 to invest in the enterprise, and that Schroeder's Tuscola operation was not the success it had been represented to be, liquidated his investment toward opening the Hoopeston store at a total out of pocket loss of approximately $28,000, including the $10,241.66 account with Gamble for goods furnished. The losses were all losses of Gass. Schroeder advanced no money in connection with the transactions involved; nor did he put any money in the corporation, for stock or otherwise.

Although in its argument Gamble attempts to saddle Schroeder with the blame for the misinformation Gamble supplied to Gass an analysis of the record reveals there is evidence which warranted a conclusion by the jury to the contrary. Gamble did the accounting for Schroeder and obviously was aware of the financial details of the Tuscola operation. The monthly statements Gamble compiled from the weekly reports sent in by Schroeder disclosed that the annual sales of the Tuscola store had not

exceeded $40,000. But Gamble represented them to be $65,000, apparently to cloak Schroeder with an aura of "success" comparable to that reflected by annual sales of such amount under the standards employed to measure sales and profits of representative Gamble store operators as described in the brochure it had previously furnished Gass. And Heile knew that the $12,000 inventory figure appearing in the financial data on Schroeder which McCarger showed to Gass was not the result of a physical inventory, which Heile had represented would be taken and would be necessary to provide such a financial statement, but was the result of a computation made by Heile on the basis of book inventory as arrived at under the accounting system employed by Gamble and contained in the monthly statements furnished by Gamble to Schroeder.

Heile had supplied the $12,000 figure to Schroeder for inclusion in the statement concerning his financial status. Heile knew that there was no basis in fact for his statement to Gass that the $12,000 figure represented an understatement of inventory.

It is apparent from the record that Schroeder did not understand the book inventory system employed by Gamble in its monthly accounting statements—nor its significance. Gamble used 73% of total retail sales to represent the cost of goods sold and then used the cost figure in computing the book inventory from month to month. The book inventory figure was reached by deducting the cost of goods sold from the sum of the opening inventory plus purchases. The resulting inventory figure could be accurate only if a uniform 37% markup was used as to every item sold. Schroeder's superintendent Heile knew that Schroeder did not mark up the full amount suggested by Gamble.

It is also apparent from the record that Schroeder's operation of the Tuscola store was not the success it was represented to be. And the jury was warranted in concluding that Gamble knew this from the accounting data it had received from Schroeder and employed in the monthly statements. Schroeder had started in Tuscola in 1959. He invested $3,000 in the business. When he sold it his $3,000 was gone and after application of the sale proceeds to obligations of the business he still owed the original owner $1,500. Schroeder worked at the business full time and his wife half-time. The total amounts they had taken for sal-

aries were $4,080 in 1960; $3,150 in 1961; and $2,391 in 1962. And these modest salary withdrawals were not for the purpose of leaving profits in the business. In 1960 the business lost $84.35; in 1961 the loss was $1,012; and in 1962 the book profit shown as $2,012.77 was in fact a loss of almost $4,000 on the basis of the actual physical inventory.

We are of the opinion that under the facts and circumstances involved the misrepresentations made to Gass by Gamble concerning the $12,000 inventory figure in Schroeder's financial statement, the misrepresentation made as to Schroeder's annual sales, and the misrepresentation made with respect to the success of his Tuscola operation, are of themselves sufficient to establish a fraud and deception on the part of Gamble. The elements requisite to such a conclusion, as defined in *Harry Alter Company* v. *Chrysler Corporation,* 7 Cir., 285 F. 2d 903 and *Roda* v. *Berko,* 401 Ill. 335, 339-340, 81 N.E. 2d 912, are all present.

Gamble urges that there is no evidence to justify an award of punitive damages and the court therefore erred in instructing on the subject. We perceive no error in this connection. Exemplary damages are properly recoverable in an action for fraud and deceit where the false representations are wantonly and designedly made. *Laughlin* v. *Hopkinson,* 292 Ill. 80, 89. And the record here supports such a conclusion. In addition to the evidence already summarized there are additional elements bearing on this phase of the matter. There is testimony that when Schroeder became aware that the inventory figure supplied by Heile was an overstatement and that the proceeds from the sale of the Tuscola store would not produce the $15,000 he was to invest in the Hoopeston venture he was told by McCarger and Heile to "keep your mouth shut" and that "Gass was in so deep that he couldn't back out". It was not until February 7, 1963 that Schroeder advised Gass that he had no money. Gass instructed Schroeder to draw no more checks on the corporation account. The following week Heile and McCarger called at Schroeder's home at 4:00 or 5:00 o'clock in the morning and attempted to get him to give them a check for the $10,241.66 account with Gamble for the balance of the merchandise furnished. The foregoing conduct of Gamble's representatives amply

serves to demonstrate the existence of the wantonness and design which authorizes an award of punitive damages.

Gamble further complains that the court in paraphrasing the pleadings to the jury referred to an allegation of the complaint, and its denial by the answer, that Gamble "knew or should have known" that the alleged representations were false. But the jury was properly instructed with respect to the element of knowledge on Gamble's part prerequisite to its liability for the falsity of any statement constituting a misrepresentation. In the context in which it occurred we do not view the tangential reference to the language of the complaint as an issue instruction requiring reversal. And, inasmuch as the jury was properly instructed, and the parties advised as to the instructions the court would give, we find no resulting error in the procedure followed by the court in giving the instructions.

We perceive no merit to Gamble's contention that the judgment orders must be reversed because of inconsistency in the verdicts. The separate verdicts, and judgments entered thereon, were but a procedural device to facilitate disposition upon review. The judgment on the counterclaim is available as a set-off against the judgment for the plaintiffs. The defendant has not been prejudiced in any manner by the procedure employed.

We have concluded that the record supports an award of punitive damages and we are fully cognizant of the Illinois doctrine that punitive damages need not bear a proportional relation to the compensatory damages and that the jury's assessment, left undisturbed by the trial court, is not subject to arbitrary action on review. *Bucher* v. *Krause*, 7 Cir., 200 F. 2d 576, 586-587. Nevertheless, we are convinced that allowing full reach to the jury's authority in the instant case to inflict damages for example's sake and by way of punishment to the defendant, (*Laughlin* v. *Hopkinson*, 292 Ill. 80, 89) the damages awarded are in any event excessive. Our affirmance is therefore conditioned upon the plaintiffs filing a remittitur of damages on the $100,000 judgment entered for the plaintiffs against the defendant to the extent of $25,000, thereby reducing said judgment to $75,000, from which the $10,241.66 judgment entered on defendant's counterclaim is to be set-off.

Plaintiffs are allowed costs on appeal.

AFFIRMED SUBJECT TO REMITTITUR.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Friday, February 25, 1966
Before
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

ALBERT W. GASS and GASS & SCHROEDER, INC., an Illinois corporation, *Plaintiffs-Appellees Counterdefendants-Appellants* vs. GAMBLE-SKOGMO, INC., a Delaware corporation, *Defendant-Appellant Counterclaimant-Appellee.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 15283-84

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED subject to plaintiffs filing a remittitur of damages on the $100,000 judgment entered for the plaintiffs against the defendant to the extent of $25,000, thereby reducing said judgment to $75,000, from which the $10,241.66 judgment entered on defendant's counterclaim is to be set-off, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that plaintiffs be allowed costs on appeal.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

ALBERT W. GASS and GASS & SCHROEDER, INC., an Illinois corporation, *Plaintiffs,* vs. GAMBLE-SKOGMO, INC., a Delaware corporation, *Defendant.*	No. 63 C 608

REMITTITUR

Now come Albert W. Gass and Gass & Schroeder, Inc., Plaintiffs, by Samuel M. Lanoff and John A. Cook, their attorneys, and shows the Court:

1. That on January 20, 1965, a judgment was rendered in this cause that "the plaintiffs, Albert W. Gass and Gass & Schroeder, Inc., recover of the defendant, Gamble-Skogmo, Inc., the sum of $100,000.00 with interest thereon at the rate of 5% as provided by law and their cost of action."

2. That on January 20, 1965, a judgment was rendered in this cause that "Gamble-Skogmo, Inc. recover of the counter-defendant, Albert W. Gass, the sum of $10,241.66 with interest thereon at the rate of 5% as provided by law and their cost of action."

3. That on February 25, 1966, an Opinion and Order was entered in the United States Court of Appeals for the Seventh Circuit, in Cause entitled "Albert W. Gass and Gass & Schroeder, Inc., Plaintiffs-Appellees, and Counterdefendants-Appellants versus Gamble-Skogmo,

Inc., a Delaware corporation, Defendant-Appellant, and Counterclaimant-Appellee," in Cause Nos. 15283-84, affirming the judgment of the District Court in favor of the plaintiffs, "conditioned upon the plaintiffs filing a remittitur of damages on the $100,000.00 judgment entered for the plaintiffs against the defendant to the extent of $25,000.00, thereby reducing said judgment to $75,000.00, from which the $10,241.66 judgment entered on defendant's counterclaim is to be set-off. Plaintiffs are allowed costs on appeal."

The Plaintiffs do, pursuant to the said Order entered in the Court of Appeals on February 25, 1966, file this, their remittitur, in the cause remitting the sum of $25,000.00 from the amount of the said judgment heretofore entered in this Court in the amount of $100,000.00 on January 20, 1965, thereby reducing said judgment to $75,000.00, and from which the said $10,241.66 judgment entered on defendant's counterclaim shall be set-off.

Samuel M. Lanoff
John A. Cook
Attorneys for Plaintiffs

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Thursday, March 10, 1966

Before

Hon. Latham Castle, Circuit Judge

ALBERT W. GASS and GASS & SCHROEDER, INC., an Illinois corporation,
Plaintiffs-Appellees, (Cross-Appellants),

No. 15283, 84 vs.

GAMBLE-SKOGMO, INC.,
Defendant-Appellant (Cross Appellee).

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

On consideration of the motion and affidavit of counsel for Gamble-Skogmo, Inc.,

It Is Ordered that the issuance of the mandates of this Court be stayed for a period of thirty (30) days in accordance with the provisions of Rule 28 of the Rules of this Court.

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1197

GAMBLE-SKOGMO, INC., A DELAWARE CORPORATION,
Petitioner,

vs.

ALBERT W. GASS AND GASS & SCHROEDER, INC.,
AN ILLINOIS CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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April, 1966.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Concise Statement of the Case 1

Argument 6

I. Lack of Conflict in Decisions 6

II. Counsel Was Informed of Trial Court's Action 11

Conclusion 15

CITATIONS.

Cases.

Clegg v. Hardware Mutual Casualty Co., 5 Cir., 264 F. (2d) 152 ..... 7, 9

Chicago & E. R. Co. v. Ohio City Lbr. Co., 6 Cir., 214 Fed. 751, 756 10

Downie v. Powers, 10 Cir., 193 F. (2d) 760 .....6, 7, 8, 15

Garland v. Material Service Corporation, 7 Cir., 291 F. (2d) 861, 863 .....7, 11, 12, 14-15

Gibson v. Lockheed Aircraft Service Inc., 350 U. S. 356 7

Gwinett v. Albatross S. S. Co., 2 Cir., 243 F. (2d) 8, 10 .....7, 11

Hardigg v. Inglett, 4 Cir., 250 F. (2d) 895, 897 ....7, 11, 12

Illinois Cent. R. Co. v. Sigler, 6 Cir., 122 Fed. (2d) 279, 286 10

Laughlin v. Hopkinson, 292 Ill. 80 12

Levin v. Joseph E. Seagram & Sons, 7 Cir., 158 Fed. (2d) 55 (cert. denied, 330 U. S. 835) 7, 11, 12

Puggioni v. Luckenbach Steamship Company, 2 Cir., 286 Fed. (2d) 340 12

Ross v. United States, 6 Cir., 180 Fed. (2d) 160, Cert. Den. 334 U. S. 832 (1952) 6, 7

Southern Pacific Co. v. Guthrie, 9 Cir., 180 Fed. (2d) 295, 301 10

Terminal R. R. Ass'n. v. Staengel, 8 Cir., 122 F. (2d) 271, Cert. Den. 314 U. S. 680 (1941) 7

Tyrill v. Alcoa Steamship Company, 185 F. Supp. 822 (S. D. N. Y. 1960) 6, 7, 8, 14

Tyson-Long Co. v. Wolfe, 7 Cir., 81 Fed. (2d) 82, 84 .. 10

Wright v. United States, 9 Cir., 339 F. (2d) 578 ..... 6, 7

Statutes.

Fed. R. Civ. P., R. 51 6

Fed. R. Civ. P., R. 61 10

28 U. S. C., sec. 1332 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1197.

GAMBLE-SKOGMO, INC., A DELAWARE CORPORATION,
Petitioner,

vs.

ALBERT W. GASS AND GASS & SCHROEDER, INC.,
AN ILLINOIS CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CONCISE STATEMENT OF THE CASE.

The Petition for Writ of Certiorari omits the concise statement of the case required by Rule 23 (e) and (g) of the Rules of Practice of the Supreme Court of the United States. This statement is here supplied.

The basis for federal jurisdiction, in the first instance, was the original jurisdiction of the District Court of this civil action as a matter in controversy between citizens of different states involving a sum in excess of $10,000.00. Title 28, U. S. C., sec. 1332.

The action was a suit by Albert W. Gass and Gass & Schroeder, Inc., a corporation owned by Gass, against Gam-

ble-Skogmo, Inc. The action sought both compensatory and punitive damages for fraud and deceit by Gamble in obtaining the investment of Albert W. Gass in a Gamble franchise. The compensatory damages claimed in the original complaint were $36,500.00 and the punitive damages were $100,000.00. (R. 5; references to the Appendix used in the Court of Appeals are shown as "R".)

On trial before the Honorable William J. Campbell in the United States District Court for the Northern District of Illinois, Eastern Division, the jury returned a verdict for plaintiffs in the sum of $100,000.00 including actual and punitive damages. The Court of Appeals reviewed the case and found that the record supported the conclusion that the false representations of Gamble were "wantonly and designedly made" and the exemplary damages were properly recoverable. (Pet. for Cert., App., p. 7a.) The Court of Appeals affirmed subject to a remittitur of $25,000.00 with which plaintiffs complied.

The Petition for Certiorari claims:

(a) That the trial court committed error in failing to inform counsel of its action on the written requests for instructions as required by Rule 51 of the Federal Rules of Civil Procedure;

(b) That, although "vigorously argued", the Court of Appeals failed to recognize and "glossed over" the "purposeful disregard" of Rule 51 by the trial judge, except to give an "elusive statement" that ". . . the parties [were] advised as to the instructions the court would give. . . ." (Pet. for Cert. p. 6.)

(c) That Rule 51 has not been construed by this court and that there is a conflict among the circuits.

In the briefing and argument of this case in the Court of Appeals for the Seventh Circuit, defendant filed a four point brief. Point III dealt with questions relating to

jury instructions and subpart C of Point III dealt with the errors claimed in the Petition for Certiorari. On that question, the Court of Appeals specifically held that the trial judge had advised counsel of its action on the instructions as follows:

> "And, inasmuch as the jury was properly instructed, and the parties advised as to the instructions the court would give, we find no resulting error in the procedure followed by the court in giving the instructions." (Pet. for Cert., App. A, p. 8a.)

The Petition for Certiorari sets out certain colloquy between Court and counsel in one of its footnotes. (Pet. for Cert., p. 4, note 4.) This exchange took place in the afternoon of January 18, 1965 immediately after court convened and immediately before the final argument.

The actual ruling on the written request for instructions took place in the morning of January 18, 1965 and at that time the court advised counsel as follows:

> "The Court: Now, pursuant to the Rules of Civil Procedure, counsel will now be advised as to the Court's action with reference to the proffered instructions.
>
> "With reference to the proffered instructions, I find that—well, let me first state in response thereto, that I shall instruct the jury first by reading directly from the pleadings rather than from the summary of the pleadings given by either side what the pleadings are.
>
> "Where possible to do so, I shall, of course, paraphrase or synthesize some of the allegations of the various documents. Otherwise, they will be given in the form in which they now appear in the Court record to the jury by reading by the Court. So much for the pleadings.
>
> "As to the law: I find that the proffered instructions by both sides, and as usual, correctly state principles of law that will be given in substance. The instructions proffered by both sides, particularly those

in some extent proffered by the defendants, are on some points repetitious and many conclude with the admonition, 'you will then find for the defendant.' I think that I counted altogether about eighteen findings for the defendant. I do not intend to read those.

"Mr. Storms: Right, I was going to withdraw some if we had a conference. I realize that, Judge.

"The Court: Well, it is not necessary. I think you are both familiar with my usual charges. Suffice to say so that you are informed in accordance with the Rules of Civil Procedure as to how I intend to instruct the jury: That the principles of law that each of you had handed up concerning fraud and deceit, the burden of proof thereon and the proof as it may be necessary in this particular case, will be given in substance.

"I have found you in disagreement on the law only on one point in your instructions and that relates to one element of fraud in that regard and both of you can read it over the noon hour, if you would like to.

"I shall rely on entirely and enunciate the law to be as it was recently found by the 7th Circuit in the case of 285 Fed. (2d). That is the recent one in Judge Mercer's.

"One of you cited it in your trial brief. I do not know who. You did, I think.

"Mr. Cook: I did.

"The Court: You did, yes. You know the case.

"Mr. Storms: I know of it. I will read it again.

"The Court: I assume both of you have read it.

"And that will be, in the main, my basis of charge as to the law with reference to this case on the subject of fraud, deceit and misrepresentation.

"I shall also give the customary and usual instruction on matter of burden of proof both as to the complaint and the counter-complaint, as to the credibility of witnesses, as to the weight of their testimony, as to burden of proof, as to preponderance of evidence and what those terms mean.

"I will conclude by giving the matter to the jury, as both sides have suggested, on general verdicts rather than specific interrogatories.

"You are thus informed." (R. 445-447.)

* * * * *

"The Court: Following the argument I will instruct the jury. The jury will be instructed along the lines that I have just indicated, also in accordance with the Rules of Civil Procedure.

"Following the Court's charge, the opportunity will be given to counsel out of the hearing of the jury and before the jury retires to object to the charge of the Court.

"The objections are to be specific and are to be related to the charge as given. You will, therefore, kindly pay attention to the charge as it is being given and make notes of any items on which you wish to voice an objection." (Transcript, p. 790; not printed in Court of Appeals Record.)

Just before the final argument, the court briefly elaborated on the foregoing advice on the request for instructions:

"The Court: Well, I intend, as I have already informed you, to state the law as enunciated by our 7th Circuit quite recently, and also by the Supreme Court of Illinois applicable to this type of situation." (R. 452.)

In the context of the instructions, the reference to the Supreme Court of Illinois referred to the leading case on punitive damages which had been cited to the court in the original trial memorandum and in connection with the instructions.

The other issues in the case are adequately set out in the opinion of the Court of Appeals and are not necessary to the considerations governing review on certiorari under Rule 19 of this Court.

ARGUMENT.

I.

THERE IS NO CONFLICT AMONG THE DECISIONS.

The aspect of Rule 51 of the Federal Rules of Civil Procedure treated in this case deals with the duty of the court to advise counsel of its proposed action on the written requests for instructions. The rule provides:

(a) That any party "may file written requests" for instructions on law;

(b) The court "shall inform" counsel of its proposed action on the requests before argument to the jury.

This rule is clear and unambiguous. Despite petitioner's contention, there is no conflict in the decisions. Each case stands separately. In each instance the courts of appeal are making a determination on the record in that case as to whether there was or was not substantial compliance with Rule 51.

The ten cases cited by petitioner deal with various ways in which district judges have or have not informed counsel of their proposed action on the written requests for instructions. Of these cases, four have held that the manner of informing counsel was inadequate and six of the cases have held that the manner of informing counsel was adequate. **(Inadequate:** *Downie* v. *Powers,* 193 F. 2d 760 (10 Cir., 1951); *Ross* v. *United States,* 180 Fed. (2d) 160 (6 Cir., 1950), Cert. Den. 334 U. S. 832 (1952); *Wright* v. *United States,* 339 F. (2d) 578 (9 Cir., 1964); *Tyrill* v. *Alcoa Steamship Company,* 185 F. Supp. 822 (S. D. N. Y.

1960). (**Adequate**: *Levin* v. *Joseph E. Seagram & Sons,* 158 F. (2d) 55 (7 Cir., 1946), Cert. Den. 330 U. S. 835 (1947); *Garland* v. *Material Service Corporation,* 291 F. (2d) 861 (7 Cir., 1961); *Clegg* v. *Hardware Mutual Casualty Co.,* 264 F. (2d) 152 (5 Cir., 1959); *Terminal R. R. Ass'n.* v. *Staengel,* 122 F. (2d) 271 (8 Cir., 1941), Cert. Den. 314 U. S. 680 (1941); *Gwinett* v. *Albatross S. S. Co.,* 243 F. (2d) 8 (2 Cir., 1957), Cert. den. 355 U. S. 828 (1957); *Hardigg* v. *Inglett,* 250 F. (2d) 895 (4 Cir., 1957).) The petitioner also cited one case of this Court, *Gibson* v. *Lockheed Aircraft Service, Inc.,* 350 U. S. 356. This case dealt with an entirely different aspect of Rule 51. However, it should be noted that, after the Court granted certiorari, Mr. Justice Frankfurter wrote a specially concurring opinion questioning the original grant of the writ because:

> "A critical examination of the 118 decisions on which the petitioner relied in his claim regarding Rule 51 convinces me that there was no such conflict and confusion." (page 357).

Of the four cases cited which found inadequacy in the advice on the requests for instructions one was under Rule 51 (*Downie* v. *Powers,* 193 F. (2d) 760, 10 Cir. 1951); two were under Rule 30 of the Federal Rules of Criminal Procedure (*Ross* v. *United States,* 180 F. (2d) 160, 6 Cir. 1950, Cert. den. 334 U. S. 832, 1952 and *Wright* v. *United States,* 339 F. (2d) 578, 9 Cir., 1964); and one was a district court decision, (*Tyrill* v. *Alcoa Steamship Company,* 185 F. Supp. 822, S. D. N. Y.).

Each of these cases is concerned with its own procedural facts. None enunciate a rule which is contrary to the decision of the Court of Appeals in this case that Judge Campbell's advice on the request for instructions was adequate. For example, the *Downie* case was concerned with an appeal from a trial judge who refused to give any advice on the requests and stated that there was "no such

rule in the Federal Courts." *Downie* v. *Powers,* 193 F. (2d) 760, 766. The Court of Appeals set forth Rule 51 and reversed because of the complete failure of the trial judge to give advice on instructions. In doing so it enunciated the rule of the other circuits:

> "It would seem therefore, that good practice would require the court to do no more than inform counsel generally as to its views on the requested instructions. See *Levin* v. *Joseph E. Seagram & Sons,* 7 Cir., 158 F. 2d 55."

There is no indication of conflict among the circuits in such a statement.

Tyrill v. *Alcoa Steamship Company,* 185 F. Supp. 822, (S. D. N. Y., 1960), was the district court decision cited by Petitioner under Rule 51. Here the district judge decided that he should grant a new trial. The following propositions were significant:

> (1) That the trial judge had "inadvertently" failed to advise counsel of his action on the request for instructions;
>
> (2) That counsel for the plaintiff had filed a sworn affidavit that he had expected an important instruction which removed issues of liability to be given and that, therefore, he thought it was only necessary to argue damages;[1]

---

1. At the end of its brief, Gamble makes an effort to bring itself within the "failure to argue" rule of the *Tyrill* case, by asserting that it failed to "argue punitive damages" (Pet. for Cert., p. 16), that this failure to argue punitive damages would be reflected in the transcript of argument, and that opposing counsel would agree with this statement. Opposing counsel does not agree. The jury argument for plaintiff was extensive on the question of punitive damages. In its argument to the jury, Gamble chose to answer this argument by stating:

> "Then there was some comment about punitive damages, example damages . . ."

After so introducing the point of punitive damages, counsel immediately moved away from it and chose to answer the point by devoting most of the balance of his jury argument to the proposition that the conduct of defendant was not even fraudulent in

Such a decision by a district judge does not constitute conflict among the circuits so as to create grounds for certiorari.

The remaining cases cited by the defendant generally recite the various methods which trial judges have used to inform counsel of the ruling on the request, comment on the adequacy of these methods, and, often, indicate that they are unable to find any prejudice in the manner in which counsel were advised of action on the requests. For example, in the case of *Clegg* v. *Hardware Mutual Casualty Co.*, 264 F. (2d) 152 (4 Cir.), cited by petitioner, the court was dealing with a failure of the trial judge to advise that he was going to use a special issue verdict rather than a general verdict. Nevertheless, the court noted that the various questions put in the special issue verdict had been argued by counsel so that the complete failure to advise of the special issue verdict was harmless. On the question of prejudice, the court stated:

> "As the matter goes to the assurance of a trial of substantial fairness, not technical perfection, the nature and time of the indication which the Court should give counsel, and the showing of harm from any supposed dereliction must be measured likewise in the same light of substantial justice. F. R. Civ. P. 61. If done here, the plaintiff can show no real error or harm." (At p. 157.)

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the first instance. Obviously defendant's counsel used this tactic in his argument on the theory that it would be unnecessary for him to emphasize punitive damages if he could convince the jury there was no fraud.

Petitioner also states, at the end of its Petition for Certiorari, that it was misled by a belief that the court would instruct that there had to be actual knowledge of falsity. The implication is that the trial judge did not so instruct the jury. The opposite is the case. The court stated the elements of fraud in its charge to the jury specifically including knowledge of falsity on the part of the defendant. (R. 461.)

Rule 61 of the Federal Rules of Civil Procedure, referred to in the *Clegg* case, provides:

> "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The trial judge was a seasoned, experienced, and fair judge. Both attorneys expressed appreciation for the patience of the court. (R. 940-941.) Every objection now raised by the defendant was impartially considered by the trial judge both during the trial and on the post-trial motion. The court of appeals reviewed the action of the trial court and found that the "jury was properly instructed, and the parties advised as to the instructions."

It belongs to judicial office to exercise discretion as to the style and form in which to expound the law in the instructions or comments upon the pleadings or the facts in evidence. *Southern Pacific Co.* v. *Guthrie,* 9 Cir., 180 Fed. (2d) 295, 301, affirmed on rehearing, 186 Fed. (2d) 962, certiorari denied in 341 U. S. 904; *Tyson-Long Co.* v. *Wolfe,* 7 Cir., 81 Fed. (2d) 82, 84; *Illinois Cent. R. Co.* v. *Sigler,* 6 Cir., 122 Fed. (2d) 279, 286; *Chicago & E. R. Co.* v. *Ohio City Lbr. Co.,* 6 Cir., 214 Fed. 751, 756. There were no errors inconsistent with substantial justice.

Rule 51 is usually considered in the light of the meaning of Rule 61, which is whether the trial court's rulings on instructions were "inconsistent with substantial justice" and did "affect the substantial rights of the parties."

Gwinett v. *Albatross S.S. Co.*, 243 F. (2d) 8, 10 (2 Cir.); *Hardigg* v. *Inglett*, 250 F. (2d) 895, 897 (4 Cir.); *Levin* v. *Joseph E. Seagram & Sons*, 158 F. (2d) 55, 58 (7 Cir.); and *Garland* v. *Material Service Corporation*, 291 F. (2d) 861, 863 (7 Cir.). There is no conflict among the circuits on this point.

While it is true that the courts of appeal have reached different results in different fact situations, this kind of conflict does not create conflict among the circuits within the provisions of Rule 19, 1(b). Conflict is not created merely because, in different cases and on different procedural facts, four of the Courts of Appeal find non-compliance with the duty to advise as to rulings on requests for instructions and six of the Courts of Appeal find compliance.

II.

COUNSEL WERE PROPERLY INFORMED OF THE TRIAL COURT'S ACTION ON THE REQUESTS FOR INSTRUCTION.

The statements of Judge Campbell are set out in full in the concise statement of facts of this brief. (R. 445-447; 452.) A careful reading of that statement demonstrates that, before the argument to the jury, Judge Campbell advised counsel:

(1) That he would "now" inform them as to the Court's action with reference to the proffered instruction;

(2) That he would read directly from the pleadings;

(3) That the instructions from both sides correctly stated the principles of law and that these instructions "will be given in substance" except for those which were "repetitious"; (R. 445-446)

(4) That the court would give its usual instructions on burden of proof, credibility of witnesses, weight of testimony, preponderance of evidence and what those terms mean;

(5) That he would submit the case to the jury on general verdicts;

(6) That there was only one disagreement and that was on one element of fraud, which would be clarified by referring to a specifically cited case which both counsel admitted being acquainted with;

(7) That he would follow the rule of the Supreme Court of Illinois (in context referring to the case of *Laughlin* v. *Hopkinson,* 292 Ill. 80, dealing with the question of punitive damages).

Counsel were, as required by Rule 51, fully informed by the District Judge. The instructions requested were given with the single change noted by the Trial Judge. (Defendant's Requests, R. 556, 562; Plaintiffs' Requests, R. 563-571; Court's charge to the Jury, R. 453-470.)

There are four recent cases in which Rule 51 has been given a practical and reasonable construction consonant with the procedure followed by the District Judge. *Levin* v. *Joseph E. Seagram & Sons,* 7 Cir., 158 Fed. (2d) 55 (cert. denied, 330 U. S. 835); *Garland* v. *Material Service Corporation,* 7 Cir., 291 Fed. (2d) 861, 862, 863; *Puggioni* v. *Luckenbach Steamship Company,* 2 Cir., 286 Fed. (2d) 340; *Hardigg* v. *Inglett,* 4 Cir., 250 Fed. (2d) 895, 897.

In *Garland* v. *Material Service Corporation,* 7 Cir., 291 F. (2d) 861, the judgment of the District Court was affirmed, the court saying at page 862:

> "Attorneys for both plaintiff and defendant presented proposed instructions to the jury. Rule 51, Federal Rules of Civil Procedure, 28 U. S. C. A. provides, 'The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury * * *.' The judge informed counsel that the case at bar was an ordinary Jones Act case and that he was going to give 'essential Jones Act instructions.' Addressing plaintiff's counsel, he told him that some

of his instructions would be given in modified form, and then stated that before the jury retired, he would give each side full opportunity to take any exceptions that it might desire to make.

"Plaintiff's counsel said to the Court, 'I was hopeful that we could possibly go over the instructions that have been tendered.' The trial court replied, 'No, I cannot do that. As I say, we could get in there and get into a discussion here and a discussion there. Now, I do concede that probably some judges do that, but I do far better and I just get along when I work it out myself.' When plaintiff's counsel again brought up the point, the Court replied, 'Well, I do not think that can be right, gentlemen, that you review the instructions that are going to be given by the Court. I have told you generally the way that I am going to instruct. This is not an unusual case. For me to take the time out here, an hour or an hour and a half, to go over the instructions with the attorneys, why, we just do not do it. After all, you have your exceptions. * * *'

"It was not necessary, under Rule 51, that the trial court hold a conference with the attorneys and go over each of the instructions which the judge proposed to give. Some judges do not reduce to writing the so-called standard instructions which they may have given many times previously. However, a strict compliance with Rule 51 would seem to require an indication as to whether the requested instructions would be given. A quite common practice is for the trial judge to note as to each of the requested instructions, 'given', 'given in substance', 'refused', 'modified', or other suitable designations."

At page 863:

"In the recent case of *Puggioni* v. *Luckenbach Steamship Co.*, 2 Cir., 286 F. (2d) 340, the defendant's counsel had submitted numerous requests for instructions, and the trial court had noted 'denied except as charged.' The Court said at page 344: 'A trial judge is not required to write out his charge in advance and submit it to counsel for their editing and exceptions * * *. Nor

is he required to incorporate every proposition of law suggested in counsel's requests provided he covers the specific principles necessary for the jury's guidance. * * * '

"In *Hardigg* v. *Inglett,* 4 Cir., 250 F. 2d 895, 987, the court affirmed the judgment in spite of the fact that there was not a strict compliance with Rule 51, holding that a reversal or new trial was not warranted 'unless material prejudice is shown to exist.'

"Trial judges should endeavor to substantially comply with Rule 51 because, under certain circumstances, refusal to do so might well be reversible error. However, we hold that under the circumstances of this case, reversible error has not been shown."

In the case at bar, petitioner was treated no differently than respondent and the court's action was not prejudicial to any of the parties.

Petitioner's complaint that the Court of Appeals "glossed over" the "purposeful disregard" of Rule 51 by the Trial Judge, is without justification. (Pet. for Cert., p. 6). On the contrary, the Court of Appeals dealt with the question concisely and directly. Although the court, in its opinion, did not write extensively on Rule 51, it specifically held that the "parties [were] advised as to the instructions the court would give." (Opinion, page 8a).

Petitioner is complaining of the court's advice on the requests for instructions as if that advice were a major issue in the case and required an elaborate opinion by the Court of Appeals. It was not. The point, here magnified, merely comprised the 32nd item of 83 specifications of error in the post-trial motion in the trial court. (R. 584-603). In the Court of Appeals the point occupied one subpart of four major points of the brief (sub-part C of point III). Only three cases were cited to the Court of Appeals by Gamble. (*Tyrill* v. *Alcoa Steamship Company,* 185 F. Supp. 822 (S. D. N. Y. 1960); *Garland* v. *Material Service*

Corporation, 291 F. 2d 861, 7 Cir., 1961; *Downie* v. *Powers*, 193 F. 2d 760, 10 Cir., 1951). The answering brief of Gass in the Court of Appeals then set out the full language of Judge Campbell, as has been done for this Court in this brief. Thereafter, the entire point was not even touched on in the Gamble's Reply Brief. Petitioner here complains that the Court of Appeals did not fully consider this aspect of the case. The answer is that the Court did consider it as fully as was warranted.

CONCLUSION.

The decision of the Court of Appeals for the Seventh Circuit was a correct and final determination that the trial court did comply with Rule 51 of the Federal Rules of Civil Procedure. The rule is clear as is evidenced by its retention unchanged in the amendments to the Rules of Civil Procedure recently ordered by this Court. There is no conflict among the circuits and no need for explanation of the rule by the Supreme Court of the United States. There is no question requiring review by this court and the Petition for a Writ of Certiorari should be denied.

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No. 1197

In the
Supreme Court of the United States
OCTOBER TERM, 1965.

GAMBLE-SKOGMO, INC., a Delaware corporation,
Petitioner,

vs.

ALBERT W. GASS and GASS & SCHROEDER, INC., an Illinois corporation,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

Cases

	PAGE
Clegg v. Hardware Mutual Casualty Co., 264 F.2d 152 (5 Cir., 1959)	5
Downie v. Powers, 193 F.2d 760 (10 Cir., 1951)	6
Garland v. Material Service Corporation, 291 F.2d 861 (7 Cir., 1961)	5
Gwinett v. Albatross S.S. Co., 243 F.2d 8 (2 Cir., 1957), Cert. den. 355 U.S. 828 (1957)	5
Hardigg v. Inglett, 250 F.2d 895 (4 Cir., 1957)	6
Harry Alter Company v. Chrysler Corporation, 285 F.2d 903 (7 Cir., 1961)	3, 4
Laughlin v. Hopkinson, 292 Ill. 80; 126 N.E. 591 (1920)	3
Levin v. Joseph E. Seagram & Sons, 158 F.2d 55 (7 Cir., 1946) Cert. den. 330 U.S. 835 (1947)	5
Terminal R.R. Ass'n. v. Staengel, 122 F.2d 271 (8 Cir., 1941) Cert. den. 314 U.S. 680 (1941)	5

Rules

Fed. R. Civ. P., R. 51	1, 4, 5, 6
Fed R. Cr. P., R. 30	1, 7

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Brief in Opposition asserts certiorari is not merited because (a) there is no conflict between circuits as to what constitutes compliance with Civil Rule 51 and Criminal Rule 30 (p. 6), and (b) the generally accepted standard of compliance is that the trial court need "do no more than inform counsel generally as to its views on the requested instructions" (p. 8).

Both assertions are wrong and the case presents a grave question of fairness in a most important aspect of federal jury trials:

1. There is deep conflict in definitive pronouncements between the circuits; the decisions cannot be harmonized by treating each one as involving a unique factual situation rather than conflicting treatment of a common procedural problem. But,

2. In any event, no trial court, in any circuit, should be permitted to adopt what respondent asserts is the test—that the trial court merely "inform counsel *generally*" what it proposes to do about tendered instructions. So lax and evasive a standard would destroy the effectiveness of the Rules, endorse surprise, and make verdicts substantially dependent upon the ability of lawyers to "guess" what the trial court really meant. The entire thrust of this Court's procedural reforms has been to remove surprise from the trial process. Surprise and uncertainty as to instructions is bound to result in wrong verdicts as the Court of Appeals finds was the case here:

The trial court first made his "cryptic", "general" announcement that he was going to "enunciate the law to be as it was recently found by the 7th Circuit in the case in 285 F. 2d" (R. 446, Br. in Opp. 4). The trial court realized that this far from definitive ruling left counsel to speculate, for shortly, in telling how to object to his as yet undelivered charge, the judge warned them to listen to the charge closely:

> "The objections *are to be specific* * * *. *You will, therefore, kindly pay attention to the charge as it is being given* * * *." (Tr. 790, Br. in Opp. 5)

Plainly, if the "general" announcement was adequate advise of the court's proposed action, his warning was

unnecessary, for counsel would have known what the charge would be. In the dilemma counsel for Petitioner promptly requested "specific ruling[s] on specific instruction[s] so I can show my specific objections * * * and * * * *so I may know beforehand and can argue accordingly.*" (R. 450, Pet. p. 4, n. 4) The request was flatly denied although counsel was entitled to "know beforehand."

The Brief in Opposition seeks to enlarge the record by claiming (p. 12) that the trial court's statement that he would follow the law of Illinois, was, "in context," a reference to *Laughlin* v. *Hopkinson,* 292 Ill. 80; 126 N.E. 591 (1920), which deals with punitive damages. This is naked invention. Nothing in context so indicates. On the contrary, the *only* case the trial court referred to "in context" was the one *"in 285 F.2d"* (*Harry Alter Company* v. *Chrysler Corporation*), which reviewed the Illinois authorities and did not even mention *Laughlin* v. *Hopkinson, or punitive damages.* Certainly the conclusion of counsel for Petitioner that punitive damages were to be excluded was a fair and rational deduction even though it proved to be wrong.[1]

Of equal importance was the "context" reference to the law on the essentials of actionable fraud.[2] The trial court said that as he had "already informed" counsel,

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[1] The Brief in Opposition (p. 8, n. 1) states that Petitioner's argument did not "emphasize" punitive damages, and quotes Petitioner's single reference to the term. The footnote serves to emphasize that Petitioner's counsel did *not* argue the point.

[2] This was immediately before the defense argument, when Petitioner's counsel again pointed out that the tendered instructions were conflicting. (R. 452)

he intended to follow the law as stated "by the 7th Circuit quite recently, and also by the Supreme Court of Illinois applicable to this type of situation" (R. 452). The specific reference was to *Harry Alter* v. *Chrysler Corporation,* which unmistakably shows that Illinois requires *knowledge of falsity.* Having earlier urged counsel to reread that case (R. 446) the reference to Illinois decisions, *in context,* seemed clearly to those cases holding that scienter is a necessary element (Pet. p. 10, n. 8). Petitioner therefore argued that such *would be* the court's instructions. However, the court's charge began with a reference to the "should have known" theory of plaintiff's complaint (R. 445); in the middle, told the jury to find whether there was guilt as "charged in the complaint" (R. 460); and at the very end, by the verdict forms read and given to the jury, brought their attention back to the "should have known" language of the complaint (R. 468). Although the charge did, at one point, include a correct statement of the law, the damage was done.

Thus the case at bar illustrates the confusion almost certain to follow from the "general announcement" practice. And the Brief in Opposition points to no reason why trial judges should not follow Rule 51 and make fair and enlightening announcements as to what their charges will be.

The Brief in Opposition endeavors to harmonize all the cases, arguing: that all are concerned with their individual procedural facts; that all circuits adopt the same "general announcement" test; and that some cases hold a particular "general announcement" was "adequate" while others hold another was "inadequate." Obviously the argument is a contradiction in terms, and shows that the circuits have been applying differing and slippery standards. This Court should end the confusion.

Counsel correctly characterize as "inadequate" the methods reversed in the 6th, 9th and 10th Circuits (Br. in Opp. p. 6) but are in gross error in claiming that the cases from the 7th, 5th, 2d, 8th and 4th circuits all hold that the trial court's manner of informing counsel was "adequate" or proper. On the contrary, all the cases, save possibly *Garland* v. *Material Service Corporation,* 291 F.2d 861 (7 Cir., 1961)[3] proceeded upon the premise that the information may have been *inadequate,* but for some reason of waiver, lack of prejudicial surprise, etc., reversal was not warranted. Thus:

7 Cir: *Levin* v. *Joseph E. Seagram & Sons.,* 158 F.2d 55, 58 (1946); failure to press for definite rulings after a general announcement, so as to be in a position to "show that he was prejudiced if in fact he was."

5 Cir: *Clegg* v. *Hardware Mutual Casualty Co.,* 264 F.2d 152, 157 (1959); actually concerned with verdict forms, where there was actual argument on the questions put to the jury "this action did not precipitate any surprise."

8 Cir: *Terminal R.R. Ass'n.* v. *Staengel,* 122 F. 2d 271, 278 (1941); failure to request further argument after surprise instruction which "may be prejudicial."

2 Cir: *Gwinett* v. *Albatross S. S. Co.,* 243 F.2d 8, 9 (1957); the *record* failed to show whether the court had advised counsel, but so far as the record showed, he argued his case without requesting such information. There was "no showing of resulting prejudice."

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[3] Even this case holds that a failure to substantially comply with Rule 51 in certain circumstances might be reversible error.

4 Cir: *Hardigg* v. *Inglett,* 250 F.2d 895, 897 (1957); all the requested instructions were given except for a modification of one. Counsel took no exception. Although the Rule "is mandatory, the fact that the Court's action in this instance was not without some reason does not satisfy the requirement", but there was no material prejudice.

Respondents assert that none of the "inadequate" cases lays down a rule contrary to the 7th Circuit's ruling here, outright reversals for mere cryptic or inconclusive announcements notwithstanding. However, the decisions cannot be reconciled, in theory or in practice, with the 7th Circuit decision at bar where, after the trial court *"purposely"* ignored the Rule, the Court of Appeals, without even referring to the Rule says "the parties [were] advised."[4]

There is sharp conflict and confusion concerning the requirement of Rule 51 that counsel be informed before argument as to the trial court's proposed action on requests for instructions. The advocate's tremendous burden of intelligent, effective jury argument, *addressed to the charge,* is at issue. The counterpart provision of

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[4] Respondents say that even *Downie* v. *Powers,* 193 F. 2d 760, 766 (10 Cir., 1951), reversed for violation of the Rule, recites that a general announcement would be sufficient. There, the "general announcements" were that the court would note on each requested instruction his disposition of it, that many were approved but some were repetitious and confusing, and counsel "ought to know what the law is." The Court of Appeals said (p. 766): "it has always been considered good practice for the court to informally advise counsel before argument generally what its instructions would be on *controverted questions of law.*" And (p. 767) ". . . the Court can not act arbitrarily. It cannot assume counsel will know what the instructions will be, and Counsel is not required to speculate at the risk of having his argument nullified or its effectiveness impaired by the Court's subsequent charge to the jury."

Criminal Rule 30 is identical. In concern for all Federal jury trials, this Court should grant the writ. The chaotic and vague standards now in vogue in many circuits are no credit to the federal judiciary.

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